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IN THE
COURT OF APPEALS OF INDIANA

STEVEN M. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0602-CR-131
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Mark A. McIntosh, Judge
Cause No. 35C01-0509-FC-55

August 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Steven M. Johnson pled guilty to one count of attempted burglary[1] as a Class C felony and one count of resisting law enforcement[2] as a Class A misdemeanor. He appeals his sentence contending that the trial court failed to properly find and weigh mitigating circumstances and that his sentence is inappropriate based on the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 9, 2005, Johnson attempted to pry open a vent cover to enter the local carwash in Huntington, Indiana. The police arrived while Johnson was trying to enter the building. Johnson fled and was later apprehended a few blocks away. After his arrest, Johnson gave a statement to police admitting that he committed these acts. Johnson pled guilty pursuant to a plea agreement to one count of attempted burglary and one count of resisting law enforcement with the sentences to be served concurrently. The trial court accepted Johnson's guilty plea and set the matter for sentencing.

At the sentencing hearing, Johnson requested that the court find four mitigating factors, specifically: (1) that he entered a guilty plea; (2) that he expressed remorse for his actions; (3) that his age was nineteen at the time of sentencing and eighteen at the time of the offense; and (4) that these were his first adult offenses. He also requested that he receive the

[1] *See* IC 35-41-5-1; IC 35-43-2-1.

[2] *See* IC 35-44-3-3.

advisory sentence[3] "of four years all but one year suspended." *Tr.* at 47.

Then the following dialogue occurred between Johnson and the court:

Defendant: I'd like to say I'm just – I regret what I did.

The Court: He regrets what he did. What does that mean?

Defendant: I understand the consequences of the burglary.

The Court: You mean in other words you regret that you were caught and suffered the consequences. Is that what you mean?

Defendant: Yeah.

The Court: That if you were out you'd do it again?

Defendant: No.

The Court: Ah. I count one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve – how about fifteen juvenile violations. Is that what you count?

Defendant: Yeah.

The Court: Why?

Defendant: I don't know.

Tr. 47-48. The trial court, after acknowledging due regard for the statutorily mandated sentencing factors, found no mitigating or aggravating factors. The trial court gave Johnson the advisory sentences -- four years for the Class C felony and one year for the Class A misdemeanor with both sentences to run concurrently.

[3] Throughout the case proceedings, the judge and defense counsel appear to have applied the prior language of I.C. § 35-50-2-6 and I.C. § 35-50-3-2 (Tr. 6-7, 37,47). Both statutes were amended effective April 25, 2005. They provide for 'advisory' sentences, not 'presumptive' sentences. *Appellee's Br.* at 3 n.3.

DISCUSSION AND DECISION

Johnson contends that the trial court failed to find relevant mitigating factors and that the sentence he received was inappropriate based on his character and the nature of the offenses. Both of these errors, Johnson claims, arise from the trial court's improper exercise of discretion.

"A sentencing decision is within the sound discretion of the court." *Edwards v. State* 842 N.E.2d 849, 854 (Ind. Ct. App. 2006), *trans. denied* (citing *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003)). Great deference is given to the trial court's sentencing discretion, and we will reverse a sentencing decision only for an abuse of that discretion. *Id*. (citing *Beck v. State*, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003)).

> If we find an irregularity in the trial court's decision, we have the option to remand to the trial court for clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Even if there is no irregularity and the trial court followed the proper procedures in imposing sentence, we still may exercise our authority under Appellate Rule 7(B) to revise the sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender.

Banks v. State, 841 N.E.2d 654, 657 (Ind. Ct. App. 2006), *trans. denied* (citing *Hope v. State*, 834 N.E.2d 713, 717 (Ind. Ct. App. 2005)).

Johnson first claims that the trial court failed to find as mitigators his plea of guilt, his remorse, his age, and his lack of previous adult offenses, all of which, Johnson contends, affect the propriety of his sentence. "If the trial court does not find aggravators or mitigators and imposes the [advisory] sentence, then the trial court does not need to set forth its reasons for imposing the [advisory] sentence." *Frey v. State*, 841 N.E.2d 231, 234 (Ind. Ct. App.

2006) (citing *Gasper v. State*, 833 N.E.2d 1036, 1044-45 (Ind. Ct. App. 2005), *trans. denied*).

Our Supreme Court has stated that trial courts should be "inherently aware of the fact that a guilty plea is a mitigating circumstance." *Francis v. State*, 817 N.E.2d 235, 237 n.2 (Ind. 2004). "The significance of this mitigating circumstance will vary from case to case." *Williams v. State*, 840 N.E.2d 433, 438 (Ind. Ct. App. 2006), *trans. denied* (citing *Francis*, 817 N.E.2d at 238 n.3). "Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned." *Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999) (citing *Scheckel v. State*, 655 N.E.2d 506, 511 (Ind. 1995)). However, a guilty plea is not necessarily a significant mitigating factor. *Williams*, 840 N.E.2d at 439 (citing *Cotto v. State*, 829 N.E.2d 520, 525-26 (Ind. 2005)).

Here, assuming that the trial court erred in failing to specifically acknowledge that Johnson's guilty plea was a mitigating factor, we conclude that the error was harmless because the guilty plea did not amount to a significant mitigator. The police witnessed Johnson in the act of attempting to pry open the vent cover and fleeing from the scene, and Johnson admitted both offenses in the police report. The evidence was overwhelmingly in the State's favor. Further, Johnson received a benefit of concurrent rather than consecutive sentences.

Johnson also claims that his expressions of remorse, his age, and lack of other adult offenses were mitigating circumstances. None of these, however, constituted a sentencing irregularity. First, Johnson's remorse showed little regret beyond a realization of the consequences of having been caught. An equivocal expression of remorse may not be a significant mitigating factor. *Bonds v. State*, 721 N.E.2d 1238, 1243 (Ind. 1999) (concluding

that trial court did not abuse its discretion by failing to find remorse as a mitigator). Additionally, the trial court was in a better position to assess the sincerity of Johnson's expression of regret.

Similarly, the trial court did not err in excluding Johnson's age and lack of adult offenses. Given Johnson's seventeen prior juvenile violations, it is likely that the lack of other adult offenses is due to his age. Prior to turning eighteen Johnson had violated probation four times, was cited for possession of marijuana twice, cited for minor possessing alcohol twice, resisted law enforcement twice, and cited once, each, for truancy, fighting, violating curfew, visiting a common nuisance, sniffing glue, theft and auto theft. *Appellant App*. 45-46. Two of those juvenile offenses were for theft and two were for resisting law enforcement. Thus, it was well within the trial court's discretion to exclude Johnson's age and lack of other adult offenses as mitigating factors.

Finally, Johnson contends that his sentence was inappropriate. Looking at the overwhelming evidence of Johnson's guilt and his extensive juvenile record, we conclude that the sentence was not inappropriate in light of the character of the accused and the nature of the offense.

Affirmed.

SHARPNACK, J., and MATHIAS, J., concur.